



Office of the Information and Privacy Commissioner for Nova Scotia
Report of the Commissioner (Review Officer)
Catherine Tully

REVIEW REPORT 16-05

June 20, 2016

Department of Justice

Summary: When applicants file access to information requests they must include sufficient particulars to enable the public body to identify the requested record. If they do not, the public body is entitled to put the request “on hold” until the request has been clarified. When a public body receives an access request it should interpret it in a fair, reasonable, open and flexible manner. In addition, as soon as the request has been clarified, the 30 day timeline restarts since time is of the essence in processing access to information requests. In this case, the Commissioner determines that while the applicant did not initially provide sufficient particulars, after an extensive clarification process, he had done so. Still, the public body failed to restart the 30 day clock for an additional two weeks. As a result, a subsequent time extension taken by the public body was not authorized because the time for processing the request had expired.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, [RSBC 1996, c 165](#), s. 5; *Freedom of Information and Protection of Privacy Act*, [RSO 1990, c F.31](#), s. 24; *Freedom of Information and Protection of Privacy Act*, [SNS 1993, c 5](#), ss. 3, 6, 7, 9, 10, 11, 32, 34, 45; *Freedom of Information and Protection of Privacy Act*, [SS 1990-91, c F-22.01](#), s 6; *Interpretation Act*, [RSNS 1989, c 235](#), s. 19.

Authorities Considered: **British Columbia:** Order F13-26, [2013 BCIPC 34 \(CanLII\)](#);
Ontario: Orders PO-2634, [2008 CanLII 1824 \(ON IPC\)](#), MO-2063, [2006 CanLII 50716 \(ON IPC\)](#).

Cases Considered: *X. v. Canada (Minister of National Defence)*, (T.D.) [1992] 1 F. C. 77.

INTRODUCTION:

[1] In December, 2011 the applicant made a request for records relating to a series of workplace investigations that spanned a number of years. His request was originally made to the Public Service Commission but was partially transferred to the Department of Justice (Department) which was also in possession of some of the responsive records. The request was placed on hold for three months. One month after re-activating the request the Department notified the applicant that it was taking a further 30 day time extension. By this point the applicant’s

patience had been exhausted and so, in response to the notice of time extension, he filed a request for review with this office.

ISSUE:

[2] Was the time extension taken by the Department on April 10, 2012 authorized under s. 9 of the *Freedom of Information and Protection of Privacy Act (FOIPOP)*?

DISCUSSION:

Background

[3] The applicant made an access request to the Public Service Commission (PSC) on December 7, 2011. The applicant's original access request described generally a series of investigations that took place over a 4 ½ year period. His request identified fifteen individuals who were involved in the investigations and also clearly stated that the Department of Justice was involved. The applicant was aware of the dates when investigations began and generally who was responsible for the investigation but his request did not specify report dates or titles because he was likely not aware of that information. His request was essentially for any and all materials in relation to the various investigations that took place during that time.

[4] In response to the request, the corporate information access and privacy administrator (the PSC administrator) for the PSC acknowledged receipt of the request and partially transferred the request to the Department of Justice. Three days later, the PSC administrator advised the applicant that his request had been placed "on hold" until further clarification was provided.

[5] Over the following three months the parties exchanged correspondence. The PSC conducted all of the correspondence during this time on behalf of itself and the Department. The Department's first letter to the applicant was dated March 16, 2012. In that letter the Department acknowledged receipt of the transferred request on December 14, 2011, said the request was put on hold effective December 16, 2011, and that the 30 day timeline was restarted on March 14, 2012.

[6] The Department re-activated the request on March 14, 2012. According to the material supplied by the Department its next correspondence with the applicant was an email dated April 10, 2012 in which it advised the applicant that it was taking a 30 day time extension. The applicant objected to this time extension.

[7] The applicant's objections were that the Department had been frustrating the matter from the beginning – in reference to the investigation itself it seems and not just the access to information request. Further the applicant was of the view that the Department had enough staff to process the request in the allotted time frame and should therefore comply. The applicant did not object to the on hold time in particular. In a recent discussion with this office the applicant indicated that he believed the Department knew all along what he was seeking. However, aside from this comment, the applicant did not provide any submissions in response to the notice of formal review in this matter.

[8] Several sections of *FOIPOP* are relevant to the discussion below:

Procedure for obtaining access

- 6(1) A person may obtain access to a record by
- (a) making a request in writing to the public body that has the custody or control of the record;
 - (b) specifying the subject-matter of the record requested with sufficient particulars to enable an individual familiar with the subject-matter to identify the record; and
 - (c) paying any fees required pursuant to Section 11.

Duty of the head of a public body

7(2) The head of the public body shall respond in writing to the applicant within thirty days after the application is received and the applicant has met the requirement of clauses (b) and (c) of subsection (1) of Section (6)...

Extension of time for response

- 9(1) The head of a public body may extend the time provided for in Sections 7 or 23 for responding to a request for up to thirty days or, with the Review Officer's permission, for a longer period if
- (a) the applicant does not give enough detail to enable the public body to identify a requested record;
 - (b) a large number of records is requested or must be searched and meeting the time limit would unreasonably interfere with the operations of the public body; or
 - (c) more time is needed to consult with a third party or other public body before the head of the public body can decide whether or not to give the applicant access to a requested record.

Transfer of request

- 10(2) Where a request is transferred pursuant to subsection (1),
- (b) the head of the public body to which the request is transferred shall respond to the applicant in accordance with this Act not later than thirty days after the request is received by that public body unless this time limit is extended pursuant to section 9.

[9] The Regulations to *FOIPOP* provide:

Application for access to records

- 3(1) An application
- (a) must state that the application is made pursuant to the Act;
 - (b) may be made in Form 1.
- 3(2) If an individual familiar with the subject matter is unable to identify a record for which an application is made, the head of the public body shall so advise the applicant and permit the applicant to amend the application to provide additional particulars.

Burden of Proof

[10] Section 45 of *FOIPOP* provides that the burden is on the head of a public body to prove that the applicant has no right of access to the record or part. It is silent as to the burden of proof

in relation to the application of s. 9. However, it is the public body who made the initial decision and who is in the best position to discharge the burden of proof.

Was the time extension taken by the Department on April 10, 2012 authorized under s. 9 of the *Freedom of Information and Protection of Privacy Act*?

[11] *FOIPOP* provides that public bodies have thirty days to respond to an access to information request. *FOIPOP* recognizes that time is of the essence in three ways. First, the thirty day timeline is mandatory subject only to limited exceptions. Second, the duty of the head of each public body includes the requirement that it make every reasonable effort to assist the applicant and to respond without delay.¹ Third, a failure to respond in time to a request is to be treated as a decision to refuse access to the record.²

[12] The Department determined that a time extension was required on April 10, 2012. A public body can only take a time extension if the time for processing a request has not expired. This is true for two reasons. First, *FOIPOP* provides that the failure of the head of the public body to respond in time to a request for access to a record is to be treated as a decision to refuse access to the record³. Second the mandatory thirty day time requirement would be meaningless if a public body was entitled to extend the time at any point after the time had expired. This approach is consistent with this office's published Time Extension Guidelines for Public Bodies and with approaches taken in other jurisdictions.⁴

[13] The Department acknowledged that it had received the transfer of the applicant's request to the Department on December 14, 2011.⁵ *FOIPOP* provides that where a request is transferred, the head of the public body to which the request is transferred shall respond to the applicant not later than thirty days after the transferred request is received by that public body.⁶ So, using that calculation, the response was due on Friday, January 13, 2012.

[14] In its submission the Department states that the applicant's request was not a complete request under the legislation until March 14, 2012. In making this submission the Department points to s. 7(2) which provides that the head of the public body shall respond in writing to the

¹ *FOIPOP* s. 7(1).

² *FOIPOP* s. 34(2).

³ *FOIPOP* s. 34(2).

⁴ Time Extension Guidelines for Public Bodies available at: <http://foipop.ns.ca/publicbodytools>. This approach is consistent with other jurisdictions. See for example OIPC BC Decision F13-26 at para. 7 and Ontario OIPC Order PO-2634 where the adjudicator stated: *Although it may seem inappropriate, and possibly even harsh, to state that barring exceptional circumstances, the consequence of being one day late is that a section 27 time extension may not be claimed, it is entirely consistent with the time-driven approach to responding to access requests established in sections 24 through 29 of the Act. In order to have meaningful time limits for taking steps in an access request, it is sometimes necessary to take a "bright line" approach to the establishment of such limits, as the legislature itself has done. In my view, the requirement that a decision to claim a time extension be communicated to the requester within the original time frame for responding to a request (30 days) is consistent with sections 26 and 27, and with the legislative scheme in sections 24 through 29. In order to be effective, the expiry of a time limit must have consequences.*

⁵ The time extension notice sent by the Department to the applicant and dated April 10, 2012 acknowledges this date.

⁶ *FOIPOP* s. 10(2).

applicant within thirty days after the application is received and the applicant has met the requirements of clauses 6(1)(b) and 6(1)(c). The Department's position is that the applicant had not satisfied the requirements of s. 6(1)(b) and (c) until March 14, 2012.

On hold time

[15] The Department received the request as a result of a transfer. *FOIPOP* provides that the thirty day time period for response runs from the date the transfer is received (as opposed to the date the request was originally received by the first public body). Section 10(2)(b) sets out this time period and further requires that the public body "respond to the applicant in accordance with this Act". It is s. 7 of *FOIPOP* that sets out the duties of the public body when responding to an access request and s. 7(2) specifies important standards for how the public body should respond. But those obligations are subject to the applicant meeting the requirements of clauses 6(1)(a) and (b) of *FOIPOP*.

[16] I agree with the Department that the time period for responding set out in s. 7(2) is subject to the applicant having met two requirements: specificity of subject matter and payment of fees.

(i) On hold for payment of fees

[17] With respect to fees it is clear that two types of fees may cause the request to be placed on hold. Section 6(1)(c) states that the person must pay fees required pursuant to s. 11. Section 11 requires that the applicant shall pay fees as prescribed by the Regulation. The *FOIPOP* Regulation provides that an applicant must pay a \$5.00 application fee and may also have to pay fees for services as specified in the Regulation.⁷

(ii) On hold for sufficient particulars

[18] *FOIPOP* also permits the public body to suspend the 30 day time period when the applicant has not met the requirements of s. 6(1)(b). On hold time to obtain particulars for the purposes of s. 6(1)(b) should be used sparingly and typically should only involve a few days while the administrator assists the applicant to provide additional particulars. On hold time in relation to s. 6(1)(b) must be strictly for the purposes of specifying the subject matter of the record with sufficient particulars to enable an individual familiar with the subject matter to identify the record.

[19] Other jurisdictions have similar provisions that require the applicant to provide *sufficient detail to enable an experienced employee of the public body, with a reasonable effort, to identify the records sought*.⁸ The Saskatchewan law requires applicants to: *specify the subject matter of the record requested with sufficient particularity as to time, place and event to enable an individual familiar with the subject-matter to identify the record*.⁹

⁷ The fact that a request is "on hold" for payment of fees is further supported by s. 11(6) of *FOIPOP* which provides that the public body may require the applicant to pay the estimated fee prior to providing the services pursuant to subsection (2). Those services include searching for records, preparing the record for disclosure, copying and shipping the record.

⁸ Section 5(1)(a) BC *Freedom of Information and Protection of Privacy Act*, s. 24(1)(b) of Ontario *Freedom of Information and Protection of Privacy Act* is very similar: (b) *provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record*;

⁹ SK *Freedom of Information and Protection of Privacy Act* s. 6(1)(b).

[20] While Nova Scotia's law does not state the need for particularity as to time, place and event, such particularity would assist an applicant in meeting his or her obligations under s. 6(1)(b). Further, the requirement that the public body make a reasonable effort to identify the record sought is not specifically stated in our law but such an approach is consistent with the duty to make every reasonable effort to assist the applicant.

[21] Courts have also considered an applicant's obligation to provide sufficient particulars. The Federal Court in considering an equivalent provision in the *Access to Information Act* stated that s. 6 imposes an obligation on the applicant to state precisely what he is seeking and a corresponding obligation is imposed on the Canadian institution to make all efforts to locate and identify documents relevant to the request.¹⁰

[22] The manner in which access requests are interpreted has also been the subject of a number of decisions by other Information and Privacy Commissioners across Canada.¹¹ I agree with those decisions where they state that upon receipt of an application for access to information a public body has an obligation to interpret requests in a way that achieves the purposes of *FOIPOP*. Further, the *Act* contains provisions that evidence an intention of the Legislature that the access process should be structured and applied by public bodies in a reasonable and flexible manner. Section 7 requires that the public body make every reasonable effort to assist the applicant and should respond without delay and the Regulations require that where the applicant has not provided sufficient detail under s. 6(1)(b) the public body must advise the applicant and permit the applicant to amend the application.

[23] In my view, the requirements noted above in combination with the purposes of the *Act* demonstrate an intention on the part of the Legislature that an individual's access requests will be processed by the public body in a fair, reasonable, open and flexible manner.¹² In its submissions the Department cited this requirement and agreed that sections 5 to 10 of *FOIPOP* should be read in this manner.

[24] It is also important to recognize that *FOIPOP* allows for an extension of time when *the applicant does not give enough detail to enable the public body to identify a requested record*. Therefore, once the public body knows generally the subject matter of the record requested, it should proceed to process the request and any additional time required to answer further questions regarding the exact particulars of individual records requested that arise during the course of processing should be obtained through time extensions under s. 9(1)(a) of *FOIPOP*.

[25] The Department says that the original request was not sufficiently specific to meet the requirements of s. 6(1)(b) and that the applicant had failed to pay required fees until March 14, 2012. Below I will examine the facts of this case based on the evidence supplied by the Department in the form of emails and letters exchanged between the parties.

¹⁰ *X. v. Canada (Minister of National Defence)*, (T.D.) [1992] 1 F. C. 77 at para. 13.

¹¹ The cases and this articulation of the relationship of the purposes of the *Act* and the duty to assist are well described by Assistant Commissioner Brian Beamish (as he then was) in Ontario OIPC Order MO-2063 at p. 5.

¹² Ontario OIPC Order MO-2063 at p. 5 likewise described the obligation of public bodies to process requests in a fair, reasonable, open and flexible manner.

On hold time applied in this case

[26] In this case, the applicant's original application referenced a series of investigations over a period of time. On December 13, 2011 the PSC administrator acknowledged receipt of the request and advised the applicant that the request was being partially transferred to the Department of Justice. Three days later, the PSC administrator advised the applicant that both the PSC and the Department of Justice had determined that further clarification was required and that his request was on hold pending such further clarification. Through a series of letters and emails the PSC administrator, on behalf of the PSC and the Department, asked a number of questions regarding the requests. Between December 16, 2011 and February 23, 2012 the parties exchanged a series of letters and emails clarifying the records sought by the applicant. In total, 69 days passed during this period of which 57 days involved time awaiting a response from the applicant.¹³

[27] The evidence establishes that during this time the PSC administrator diligently follow up on her clarification requests and, in my opinion, made significant attempts to assist the applicant in formulating a request that specified the subject-matter of the records requested. These efforts were consistent both with the public body's duty to assist and with the obligations set out in s. 3 of the Regulations for *FOIPOP* noted above.

[28] During the same time period the applicant actively participated in the discussions and provided feedback to the PSC administrator's suggestions. At no point in the correspondence does he indicate a belief that the clarification process is unnecessary and on several occasions he thanks the PSC administrator for her assistance.

[29] I am satisfied, based on the broad scope of the original request, the active participation of the applicant and on the nature of the follow up questions asked by the PSC administrator, that the clarification process was reasonably necessary in the circumstances of this case.

[30] Several aspects of the PSC administrator's approach to obtaining particulars in this case illustrated best practices:

- She advised the applicant within a relatively short period of time that further clarification was required.
- She advised the applicant in writing that the request was being placed on hold for the purpose of clarification.
- She asked specific questions of the applicant and made specific suggestions for how the applicant could meet the requirements of s. 6(1)(b) of *FOIPOP*.
- She responded promptly (within days) to each of the applicant's clarifications.

¹³ December 16, 2011 – January 12, 2012 (27 days), January 19, 2012 – February 1, 2012 (13 days), February 3, 2012 – Feb. 6, 2012 (3 days), February 9, 2012 – February 23, 2012 (14 days).

[31] *FOIPOP* provides that a person who makes a request may ask for a review of any decision, act or failure to act of the head of the public body that relates to the request. The PSC administrator did not advise the applicant of his right to request a review of the on hold decision. One further best practice both with respect to on hold letters and clarification letters is:

- Advise the applicant of his or her right to request a review of the decision pursuant to s. 32(1) of *FOIPOP*.

[32] Based on the information the PSC added to the request it seems likely that the PSC administrator discussed the request topic with a knowledgeable person within the business unit. One further best practice when considering whether the request has sufficient particulars is:

- Before deciding whether further particulars are required, consult with an individual familiar with the subject-matter and ensure that he or she is taking into account the public body's duty to make every reasonable effort to assist the applicant.

[33] On February 23, 2012 the applicant confirmed his final agreement with the wording of his request as proposed by the PSC. That wording is repeated verbatim in letters sent by the PSC on behalf of the Department and the PSC on February 27, 2012 and again on March 14, 2012. The only change to the request was that the PSC re-ordered the list of records requested – changing the paragraph numbers but not the text itself. In other words no further clarification occurred after February 23, 2012.

[34] As a result, the request could not have been kept on hold for clarification after February 23, 2012 because after that date no further particulars were sought or provided. The text of the request remained unchanged after that date except for a slight re-ordering of the paragraphs. Section 7(2) of *FOIPOP* states that “the public body shall respond in writing 30 days after ... the applicant has met the requirements of clauses (b) and (c)”. I find that as of February 23, 2012, the applicant had clearly met the requirements of s. 6(1)(b). The obligation was the applicant's, and once met, the request could not remain on hold for this reason.

[35] The PSC advised the applicant in the February 27, 2012 letter that the request was still on hold because the applicant was required to provide an application fee of \$5. The PSC requested this fee and the applicant supplied the fee on March 1, 2012. But the applicant had already paid the fee when he originally applied for the records on December 1, 2011. The PSC acknowledged its error and returned the second \$5 fee to the applicant in its letter dated March 14, 2012.

[36] In its submissions the Department notes that the applicant must meet the requirements of both clauses 6(1)(b) and 6(1)(c) for the thirty day time period to run. Section 6(1)(c) is the requirement that the applicant pay any required fees. The applicant had met the \$5 fee requirement in December, 2011 as acknowledged by the PSC in its letter to the applicant dated March 14, 2012. No processing fees were requested by the Department. Therefore, I find that after February 23, 2012 there was no basis upon which the public bodies could place or leave the request on hold.

[37] The Department acknowledged that it had received the transferred request on December 14, 2011. The request was placed on hold 2 days later on December 16, 2011. Since I have found that as of February 23, 2012 there was no basis in law to keep the request on hold, the clock began again on February 24, 2012.¹⁴ The due date would then have been 28 days later; that is March 22, 2012. The Department purported to take a time extension on April 10, 2012. As the time had expired on March 22, 2012 there was no time to extend and so the Department was not entitled to take a time extension on April 10, 2012.

[38] What is the remedy when a time extension is not authorized? *FOIPOP* provides no specific remedy other than the public body respond immediately to the request. On May 10, 2012 the Department responded to the applicant's request. There is no other remedy and so I recommend that the Department take no further action in this matter.

FINDINGS & RECOMMENDATIONS:

[39] In summary, when applicants make access to information requests they should:

- submit their request in writing;
- state that the request is being made under *FOIPOP*;
- specify the subject matter of the record sought as precisely as possible; and
- provide sufficient detail such as information relating to the time, place and event whenever possible.

[40] Best practices for public bodies when receiving and interpreting access to information requests are:

- Interpret access to information requests in a fair, reasonable, open and flexible manner.
- Before deciding whether sufficient particulars are required, consult with an individual familiar with the subject-matter and ensure that he or she is taking into account the public body's duty to make every reasonable effort to assist the applicant.
- If further particulars are required:
 - Immediately (within a day or two of receipt of the request) advise the applicant of the need for further particulars.
 - Ask specific questions and make specific suggestions to illicit the needed information.
 - Advise the applicant that he or she has the right to request a review of the public body's decision to place the request on hold.
 - Permit the applicant to amend the application to provide additional details.
 - Respond promptly to the applicant's communications and questions.
 - Conclude the on hold time as quickly as possible, generally within a few days.
 - Restart the 30 day timeline immediately upon receipt of the needed information.

¹⁴ Nova Scotia's *Interpretation Act*, s. 19(i) provides that where a period of time dating from a given day, act or event is prescribed or allowed for any purpose, the time shall be reckoned exclusively of that day or the day of the act or event. The event in this situation was compliance with the requirements of s. 6(1)(b) effective February 23, 2012. Therefore, in accordance with the *Interpretation Act*, time started again on February 24, 2012.

[41] I find that the Department's time extension taken on April 10, 2012 was not authorized as the time for processing the request had already expired.

[42] I recommend that the Department take no further action in this matter.

June 20, 2016

Catherine Tully
Information and Privacy Commissioner for Nova Scotia